

June 22, 1999

MEMORANDUM FOR Shelley N. Fidler
Acting Director, Federal
Energy Management Program

FROM: Mark S. Schwartz
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Energy Policy

SUBJECT: Relationship of the Anti-Deficiency Act to Multi-year Contracts
Under the Utility Incentive Program Authorized Under Section
152(f) of EPACT

I. BACKGROUND

The Department of Energy's (Department) Federal Energy Management Program (FEMP) is assisting federal agencies in improving energy and water efficiency to meet the goals of the Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486 (1992) (codified as amended in scattered sections of Title 42 of the U.S. Code) and Executive Order 13123. Because of the inability of Federal agencies to obtain appropriated funding for Federal building energy-efficiency and water conservation projects, one of the primary goals of FEMP is the implementation of the demand side management (DSM) and energy and water conservation and efficiency projects through utility services contracts and energy savings performance contracts. FEMP has requested our views as to whether and to what extent the authority provided to Federal agencies under section 152(f) of EPACT, which amends section 546 of the National Energy Conservation Policy Act, 42 U.S.C. 8256(c)(1997), is constrained by the Anti-Deficiency Act, 31 U.S.C. §1341 (1998) and whether contracts under section 152(f) also qualify as "public utility services" contracts under section 201 of the Federal Property and Administrative Services Act of 1949, as amended (Federal Property Act), 40 U.S.C. §481(a)(3) (1997), which are eligible for a ten-year term.

FEMP's inquiry is directed to whether Federal agencies are required to obligate the entire contract amount, or amounts for termination costs, under DSM and energy and water conservation and efficiency contracts. This sort of obligational requirement would in FEMP's view negate the purpose of section 152(f),¹ which is to make utility incentives available to federal

¹ Contracts under section 152(f) of EPACT are contracts with utilities under utility incentive programs (UIPs) offered by utilities. Each agency may accept any financial incentives,

agencies on the same basis as they are available to other customers. The up to ten-year contract term available for “contracts for public utility services” under section 201 of the Federal Property Act is needed to make these projects economically viable.

II. QUESTION

You have requested our views on whether DSM and energy and water conservation and efficiency contracts entered into with utilities under section 152(f) of EPACT are “contracts for public utility services” under section 201 of the Federal Property Act, and thus can have both a ten-year contract term and an exemption from the full funding requirements of the Anti-Deficiency Act, 31 U.S.C. §1341 (1998).

III. CONCLUSION

DSM and energy and water conservation and efficiency contracts authorized by section 152(f) of EPACT can qualify as “contracts for public utility services” under section 201 of the Federal Property Act, if the services and goods provided meet the requirements for “utility services.” As public utility service contracts they are not subject to the requirement that funds must be obligated for expenses (including potential termination costs) beyond the first year, and the contracts can have up to a ten-year term. In order to facilitate your implementation of this conclusion, we have prepared model agreements that reflect the kinds of energy conservation measures that we conclude are properly categorized as “public utility services.”

IV. DISCUSSION

Section 201(a)(3) of the Federal Property Act authorizes the General Services Administration (GSA) to enter into contracts for public utility services for periods not exceeding 10 years. It was enacted to effect economies in the procurement of such services.² Use of section 201 presupposes the availability of a fiscal year appropriation for the first year and that the services to be rendered are merely incidental to the conduct of authorized government business.

Section 201(a) of the Federal Property Act provides, in part, as follows:

goods, or services “generally available to customers of such utility.” *Id.* An agency, therefore, must satisfy “the criteria which generally apply to other customers” under a UIP. Finally, an amount equal to fifty percent of the agency’s savings may be retained by the agency for additional energy efficiency measures. *Id.*

² GSA has delegated to DOE certain authority to enter into contracts for utility services for periods not to exceed ten-years. Delegation of Authority to the Secretary of Energy, signed by Brian K. Polly, Assistant Commissioner, Office of Procurement, Public Buildings Service, General Services Administration, dated February 12, 1987. *See* FAR §41.103(a)(3), 48 C.F.R. §41.103(b)(1998) (referencing the delegation).

The Administrator shall (3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection: Provided, That contracts for public utility services may be made for periods not exceeding ten years... .

Federal Property Act, §201(a)(3) (emphasis added).

A. What are “public utility services”?

DSM and energy and water conservation and efficiency services are measures implemented or accomplished through specific projects intended and designed to achieve savings in the cost of energy and water, reduce demand for energy and water, and achieve energy efficiency improvements and water conservation. These measures are called Energy Conservation Measures (ECMs). The construction or installation of ECMs and other energy savings measures in government, commercial, industrial or residential dwellings is an important and integral part of planning and predicting power capacity needs in the future. While these contracts often involve the installation of equipment or refurbishing existing equipment, with a strong service component, these ECMs and similar efforts are extremely important to the modern utility as a valuable means of reducing or slowing the growth of demand for water, gas and electric services. These measures affect how much new capacity must be constructed or acquired and ultimately the cost of utility services to the rate payer. State public utility commissions have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity.³

The Federal Property Act does not provide a definition of “public utility services.” The phrase is used in various states’ laws, in the context of comprehensive regulation of the provision of public utility services. However, the term does not have a common definitive meaning:

³ States, through statutes, regulations, and the actions of their public utility commissions, have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity. E.g., Indiana Admin. Code, Title 170. Indiana Utility Regulatory Comm., Art. 4, Rule 7, 6(b) (describing demand side management as a new source of utility supply); Texas Admin. Code, Title 16. Part II, chap. 23, subchapter D. §23.31(a)(5) (requiring electric utilities to attempt to reduce total demand before applying for a certificate for a new generating unit). EPACT included amendments to the Public Utility Regulatory Policies Act to ensure that utilities could regard investments in demand side management and energy conservation as equally profitable with investments in increased generating capacity. EPACT §111(a), amending 16 U.S.C. §2621; EPACT §115, amending 15 U.S.C. §§3202-03. These developments both demonstrate that engaging in energy conservation and demand management have become viewed as a means of providing utility services to the public.

“A ‘public utility’ has been described as a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service. While the term has not been exactly defined, and as has been said, it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or services, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges.”

73B C.J.S. Public Utilities §2 (1997); see also 64 AM. Jur. 2nd Public Utilities §1 (1997).

The General Accounting Office (GAO) has had few occasions to address the parameters of this phrase in the context of the Federal Property Act. GAO has declined to limit the definition of public utility to that used by a particular state:

The status of the Pipeline Company as a public utility under Title 42 of the Alaska Statutes is, in our opinion, doubtful. We are of this view because the company is not subject to regulatory control and because it has not served the public generally with natural gas. But the Congress has authorized long-term contracting in the case of services having public utility aspects. In doing so the Congress did not require that these public utility services be procured only from those firms which clearly come within the strict legal definition of a public utility. Perhaps in recognition of the legal imponderable involved in the application and enforcement of State laws regulating public utilities, and in view of the diversity of opinions between various jurisdictions respecting the legal character of public utilities, the Congress in its judgment determined to categorize the service rather than the contractor....

45 Comp Gen. 59, 64 (1965). “Thus, it is the nature of the product or service provided and not the nature of the provider of the product or services that may determine what are “public utility services.” Moreover, GAO has indicated its view that the phrase “public utility services” should be interpreted broadly: “[T]he concept of what product or service constitutes a public utility service is not static for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service.” 62 Comp. Gen. 569, 575 (1983).

We have concluded that the fact that ECM and DSM services involve transferring title to equipment does not defeat their character as “public utility services.” 62 Comp. Gen. 569, 574 (1983). Where a contract was for the procurement of telephone equipment as well as telephone services, the Comptroller General decided that it was a contract for public utility services under section 201 of the Federal Property Act. The Comptroller General stated the following views on what are “public utility services”:

Further, while public utilities are generally described as providing services, we think that the concept of utility services can include the sale of a product or equipment as well as providing services in the literal sense.

Id. The Comptroller General concluded as follows:

On the basis of these fundamental premises, we think that the sale of telephone equipment or facilities with related services is a public utility type service just as much as leasing the equipment to the Government at a rental designed to recover the cost of the contractor's investment in facilities and equipment over the life of the rental agreement would be. The only difference between the two is that in the former case the Government acquires title to the system while in the latter, title remains with the utility. Thus the nature of service is virtually identical, and in any case, the difference is not so fundamental as to warrant its exclusion from the scope of transactions to which the authority of [section 201] applies.

Id. Even, however, if it is concluded that "qualified" DSM and ECM contracts entered into under section 152(f) of EPACT, standing alone, are not contracts to provide public utility services, these contracts would be contracts incidental to "contracts for public utility services." For instance, it has consistently been GSA's view that equipment provided with telephone services is incidental to those services:

It has been the position of GSA that the contracts which we enter into for telephone services are public utility services contracts regardless of whether the successful offeror was a tariffed carrier or an interconnect company. GSA has viewed the equipment involved in telecommunications procurement as incidental to the services.

....

GSA has historically regarded the equipment provided with telephone services as an incidental but necessary element of the services. Thus, we have always considered the acquisition of equipment as falling within the meaning of contracts for public utility services.

....

Whether the service is provided by utility-owned equipment or Government-owned equipment does not change the nature of the services.

62 Comp. Gen. 569, 573-74 (1983).

Similarly, the equipment or products installed in federal buildings as DSMs or ECMs are necessary to reduce energy and water consumption, reduce the cost of energy and water and

insure the adequate delivery of electric, gas, or water services and is incident to those services. The ability to plan, measure and reduce electric, gas and water consumption in the future is an important part of providing utility services. Moreover, reducing the long term cost of energy to the federal government was the specific reason why Congress included section 201 in the Federal Property Act. Therefore, so long as the dominant or primary purpose of the project is to reduce energy and water use or demand, and there is a direct connection between any equipment (or services) to be provided and achievement of the dominant or primary purpose, it should not matter whether the ECM or DSM activities include the provision of equipment, title to which passes to the government.

In summary, contracts entered into under section 152(f) of EPACT may also be “contracts for public utility services” under section 201(a)(3) of the Federal Property Act.

B. GSA’s Views

While the Secretary of Energy has the authority to develop guidelines to implement section 152(f) of EPACT,⁴ it is significant that GSA, the agency with primary responsibility and authority under section 201 of the Federal Property Act, has concluded in an opinion dated July 29, 1994 (“Exhibit A”), that certain DSM and ECM contracts entered into under section 152(f) of EPACT are contracts for “public utility services:”

In addition, GSA has authority under the Act to receive the goods and services contemplated under the proposed agreement with [the utility], including but not limited to, energy related equipment, its installation, and personnel training. 42 U.S.C. §8256(c)(2)-(4); 40 U.S.C. §490(f)(7)(B).

The expenditure of the funds as contemplated by the proposed agreement with {the utility} is necessary for and incidental to compliance with the energy conservation requirements of the Act, 42 U.S.C. §8253. Therefore, this constitutes a necessary and proper expense for utility services. ...

Likewise, in accordance with 42 U.S.C. §8256(c)[Section 152(f) of EPACT], Congress specifically has authorized agencies to participate in utility incentive programs conducted by utilities and generally available to customers of such utilities. Participation in such programs will provide one of the means for GSA to satisfy the energy performance requirements for Federal buildings mandated by Congress in 42 U.S.C. §8253. As explained above, the broad authority may be funded by GSA’s Real Property Operations (BA-61) appropriations as necessary and proper expenses for utility services. ...

⁴ Section 152(c) of EPACT provides the Secretary of Energy with the authority to develop “guidelines for the implementation” of the “Federal Energy Management” provisions of EPACT. 42 U.S.C. §8253(d) (1998).

GSA Op. Off. Real Property Division, 3-4, July 29, 1994 (emphasis added).

Finally, GSA has negotiated and entered into a series of “areawide” contracts with utilities to provide electric, gas and gas transportation services to Federal agencies.⁵ In order to use an areawide contract any Federal agency in the defined geographic area simply has to execute an “authorization” agreement with the utility. The “areawide” contracts are entered into pursuant to GSA’s “utility services” authority provided under section 201(a)(3) of the Federal Property Act. GSA now includes some DSM and ECM services under the areawide umbrella contracts. This is further evidence of GSA’s view that DSM and ECM services may be “utility services” under section 201(a)(3).

C. What are the funding requirements for contracts for public utility services under section 201 of the Federal Property Act?

The Anti-Deficiency Act provides, in part, as follows:

An officer or employee of the United States Government or of the District of Columbia government may not-

- (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
- (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law....

31 U.S.C. §1341 (emphasis added). The Anti-Deficiency Act prohibits an executive agency from making expenditures or incurring obligations in excess of available appropriations, and from making a contract or obligation for the payment of money in advance of appropriations. Thus, as a general rule, the cost of a contract must be fully funded at the time the Government enters into the contract. The Anti-Deficiency Act, however, provides that Congress can authorize Federal agencies to “contractually” obligate the Government without the availability of an existing appropriation. “Contract authority” is statutory authority specifically authorizing “an agency to enter into a contract in excess of, or prior to, enactment of the applicable appropriation.” See, G.A.O., Principles of Federal Appropriations Law, Vol. II, Ch. 6-51 (1992).

Section 201(a)(3) of the Federal Property Act has been interpreted to provide “contract authority.” This provision has been interpreted as providing authority to enter into contracts for a term of ten-years without obligating funds for the total cost of the contract at the time the contract is entered into:

⁵ See, e.g., Areawide Public Utility Contract for Electric, Natural Gas, Gas Transportation and Energy Management Services, Contract No. GS-00P-95-BSD-0008, between the United States of American and Public Service Company of New Mexico, August 23, 1995.

The purpose of the proviso authorizing contracts for public utility services to be made for up to 10 years is to permit GSA to take advantage of discounts offered under long term contracts. If this provision is applicable, GSA need not have available to it budget authority to obligate the total estimated cost of the Centel contract but only sufficient budget authority to obligate its annual costs under the agreement.

. . . .

As we have indicated above, GSA need not obligate the total estimated cost of the contract against the Fund, but only amounts necessary to cover it annual costs under the contract.

62 Comp. Gen. 569, 576 (1983) (emphasis added). Section 152(f) does not expressly provide authority to enter into ten-year contracts nor does it expressly provide an exception to the full funding requirements of the Anti-Deficiency Act. However, §152(f) contracts to the extent that they also constitute contracts for public utility services (under §201(a)(3) of the Federal Property Act) only require obligation of the annual costs under the contract during each year the contract is in effect.

D. Qualified DSM Contracts

Concerns have been raised that entering into DSMs, ECMs or other energy savings contracts with utilities of the type contemplated by §152(f) of EPACT may in some cases result in providing goods and services that are not “utility services” under section 201 of the Federal Property Act. In order to alleviate these concerns and provide protections against misuse of the authority provided in section 152(f), we have concluded that only “qualified” DSM and ECM contracts will be designated “contracts for public utility services” under section 201 of the Federal Property Act. These qualifications will insure that the primary purpose of a DSM or ECM contract for “public utility services” will be to reduce energy and water cost and use.

These requirements or qualifications are reflected in the attached GSA Areawide Agreement (Exhibit B) and the draft Civilian Model Utility Agreement (Exhibit C). Included in the requirements for “qualified” DSM or ECM contracts are the following requirements:

- (1) That the primary purpose of an ECM or DSM contract under section 152(f) must be to reduce the cost or use of energy and water and achieving greater energy efficiency [for example, DOE could not construct an entire new building to achieve or facilitate a programmatic objective under the guise of an ECM or DSM contract under section 152(f)];
- (2) That general construction, training courses, and the purchase of supplies or equipment not directly related to an ECM or DSM is not permissible under section 152(f) of EPACT;

- (3) That energy or water savings must be sufficient to pay all costs under a DSM or ECM contract; and
- (4) That ECMs or DSMs will not normally be used unless the net overall energy or water cost reduction can be demonstrated and verified.

Other restrictions and limitations on the use of ECM and DSM contracts are reflected in the attached model GSA Areawide contract and the Civilian Model Utility Agreement, which provide the necessary requirements and protections to “qualify” an ECM or DSM contract as a “contract for public utility services” under section 201 of the Federal Property Act. Proposed ECM or DSM contracts which contain terms or conditions that are materially different from those provided in Exhibits C and D create circumstances which require legal review by the Office of General Counsel.

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